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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 253

DURWOOD O. PHILLIPS, ET UX., *Petitioner,*

V.

BILL C. LATHAM

Respondent

Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, Eastland, Texas

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Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, Eastland, Texas

Your petitioners, Durwood O. Phillips and wife, Mary Sue Phillips respectfully petition for the issuance of a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas in its Cause No. 4,264 styled above.

Note—Unless otherwise indicated, all emphasis has been supplied by petitioners.

OPINION BELOW

The opinion of the Court of Civil Appeals (A-1 to A-4 herein) is reported at 433 S.W.2d 775.

JURISDICTION

This case was tried before a jury in the 101st District Court of Dallas County, Texas. Petitioners' key evidence was excluded and they sustained an unfavorable verdict and take nothing judgment(Pleadings 42-51). The judgment (A-4) and opinion (A-1) of the Court of Civil Appeals affirming the case were dated October 25, 1968. A timely motion for rehearing filed November 9, 1968 (A-5) was overruled November 15, 1968 (A-6). Thereafter, petitioners' application for Writ of Error to the Supreme Court of Texas (A-6) timely filed on December 18, 1968 was denied without opinion on January 22, 1969 (A-7) and a timely motion for rehearing in the latter court (A-7) filed on February 6, 1969 was overruled on February 19, 1969 (A-8). On May 14, 1969 this Court through Mr. Justice Black entered an order extending the time to petition for certiorari to and including June 20, 1969.

Petitioners submit that they have been deprived of rights secured to them by the Fourteenth Amendment to the United States

Constitution. They rely on 28 U.S.C., § 1257(3) to invoke the jurisdiction of this Court.

QUESTION PRESENTED

Whether the method of proceeding adopted by the Texas Court of Civil Appeals so far departs the accepted procedures as to constitute a denial of the Fourteenth Amendment guaranties of due process and equal protection of the law.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED
(Text at A-8)

The United States Constitution, Amendment Fourteen, Section 1

28 U.S.C., § 1257(3)

Rule 169, Tex.Rules Civ.Proc.

Rule 370, Tex.Rules Civ.Proc.

Rule 419, Tex.Rules Civ.Proc.

STATEMENT OF THE CASE

HOW FEDERAL QUESTION WAS PRESENTED BELOW

Petitioners' federally guaranteed rights were invaded by the Court of Civil Appeals

in failing and refusing to answer the questions legitimately and properly preserved and presented to that Court. Petitioners immediately called the matter to the Court's attention by points 1,15,16 and 17 of the Motion for Rehearing (A-5). The federal question was presented to the Supreme Court of Texas by points 1,3,4 and 6 of the Application for Writ of Error (A-6). It was again raised by points 1, 3, 4 and 6 in Motion for Rehearing (A-7). Petitioners submit that certiorari should issue to the Court of Civil Appeals rather than the Texas Supreme Court because the former court is in possession of the record and the latter court refused a writ of error and issued no judgment on the merits.

FACT STATEMENT

This is an action to recover title and possession of real estate at 4956 Wisteria, Dallas, Texas which was previously the home of the petitioners, who were the plaintiffs in the trial court and were appellants in the Court of Civil Appeals.

The facts stated in the opinion are correct insofar as they go. The opinion wholly fails to show the nature of the excluded statements of respondent Latham and completely fails to show what petitioners' contentions are in this respect. Petitioners submit that the privilege granted by Rule 169, Tex.R.Civ.Proc., relates only to admissions strictly defined and does not relate to evasions, equivocations and spurious denials. Petitioners submit that there is no valid consideration of public policy to support such a privilege and it is violative

of due process for a state court to provide that the statements of a party may not be introduced in court where the exclusion thereof fails to serve any valid interest. Petitioners further submit that the failure of the Court of Civil Appeals to answer or even discuss our basic proposition, that evasions, equivocations and spurious denials are not within the privilege granted by Rule 169, in and of itself denies to petitioners the right to have their case determined in accordance with the accepted course of procedure in a duly constituted court.

Under Texas practice, the transcript of the evidence is known as the statement of facts. Petitioners say that the Texas law is clear to the effect that no statement of facts is necessary where reversible error is shown from the transcript of the papers in the case. The Texas Courts failed and refused to answer such contentions, and in doing so, deprived petitioners of the accepted course of procedure in a duly constituted court.

THE TRIAL

This case was tried under the Texas special issue system. Eighteen separate issues were submitted to the jury but they raised only one question. Petitioners claimed misrepresentation. Respondent denied it. Essentially, the only question was: veracity.

There had been previous litigation between the parties. Respondent Latham, a house builder and real estate promoter, now contends that the agreed price of the

house in Duncanville which respondent was selling to petitioners was $19,450 and that petitioners received from respondent Latham a $4,000 trade-in allowance for petitioners' home on Wisteria Street. It was uncontroverted that a $15,450 purchase money loan was obtained from a savings and loan association.

Petitioners sought at the trial of this case to show that respondent had changed his story. Requests for admissions had been filed by petitioners in the previouw lawsuit. Respondent did not admit the matters which were demanded of him in that case. Petitioners concede that if he had admitted the matters propounded, the admission would have been within the scope of the privilege granted by Rule 169. Instead of giving admissions as requested, respondent filed sworn denials, equivocations and evasions. By his responses in the previous lawsuit, respondent contended that the price of the property was $15,900, later reduced by agreement to $15,400. Obviously, if the ultimate selling price of the property was only $15,400, the Wisteria property was not a trade-in because petitioners executed a purchase money mortgage for $15,450. Just as obviously, respondent's sworn declarations in both lawsuits cannot be true in both instances.

The jury was not permitted to know that respondent had changed his story. Lacking this vital evidence which destroyed respondent's credibility and impeached the entire defensive theory of trade-in, the jury found for the respondent.

APPEAL IN THE STATE COURT

Likewise, petitioners presented two points of error to the Texas Court of Civil Appeals but they raised only one question. As the Court states in its opinion, any child with a grade school education can apprehend from the face of Texas Rule 169 that "any admission * * * is for the purpose of the pending action only" and "may not be used in any other proceeding." However, your petitioners did not institute an appeal because they or their attorney had any reading deficiency. Instead, petitioners asked the appellate court to construe the term "admission." This, the Court wholly failed and refused to do.

We will not dwell on the issue presented to the Court of Civil Appeals. The question here is not whether the Court of Civil Appeals correctly decided the question before it but whether the Court followed the correct procedures. We did submit there that the term "admission" is subject to judicial construction. We submitted that while in Wigmore's Code of Evidence, 3rd ed., 201, an admission is defined as "any utterance, made by a party * * *, asserting any relevant fact," the term is defined in Cyclopedic Law Dictionary, 3rd ed., as a concession of the truth of certain facts and is regarded in pleading as the acknowledgment of the truth of a matter alleged by one's opponent. Petitioners contended to the Court of Civil Appeals that the term "admission" as set forth in Texas Rule 169 referred only to the latter more restrictive definition.

Therefore, your petitioners argued, the statements of respondent in response

to the requests for admissions were not "admissions" at all, as the term is contemplated by the Rule because they were merely evasions, equivocations and denials. Petitioners further urged that the entire purpose of the Rule was to encourage admissions and conversely that the Rule should be interpreted so as to discourage evasions, equivocations and denials. They contended that a broad interpretation of the term "admission" would severly cripple Texas Rule 169 if not destroy it altogether. As further proof that the Rule contemplated only the restrictive definition of the term "admission," petitioners pointed to the fact that under the Rule, admissions need not be sworn and need not even be in writing whereas denials must be under oath. Petitioners argued that the Rule should not be construed so as to encourage false swearing. Petitioners cited a number of authorities concerning the purpose and spirit of the Rule which will not be repeated here. Obviously, the Texas Court of Civil Appeals has failed to answer the question presented.

THE STATEMENT OF FACTS

Petitioners' appeal to the Texas Court of Civil Appeals was based on a transcript of the pleadings. The requests for admissions from the prior case were themselves documentary in nature and they were incorporated into a bill of exceptions which appears in the transcript (Pleadings 23-39). Petitioners were, and are, of the view that the Texas law does not require that every appellant buy and pay for a complete record. They cost a lot of money which a multitude of litigants, including your petitioners

would be hard put to pay. Petitioners were and are of the view that the record here presented was, and is, sufficient because it showed that the trial court committed material error and petitioners sustained harm thereby.

In this connection it is to be noted that respondent is represented by a competent attorney, that respondent filed an answer in the Court of Civil Appeals and an answer in the Texas Supreme Court as well, that respondent never at any time objected to the record as presented, that respondent has never contended that the record is insufficient in any manner. Texas Rule 419 provides that statements made in the appellant's brief may be accepted as correct unless challenged by his opponent.

The Court of Civil Appeals seized upon the ground of "no statement of facts" sua sponte. Petitioners were never afforded a sufficient opportunity to brief or argue the matter because the question was simply not in the case until the Court's judgment had already been rendered. They were provided with no opportunity to proceed under Texas Rule 370. Again, the Court of Civil Appeals failed to make any kind of definitive ruling. Nor did it point out any manner in which the record was deficient. Instead, the Court declared that "Ordinarily a judgment should not be reversed for alleged erroneous exclusion of evidence in the absence of a statement of facts."

A recent report of the Judicial Counsel shows that 57% of the cases on appeal are affirmed. It would have been equally

judicious and equally correct for the Court to prepare a mimeographed form of opinion for use in all cases stating "Ordinarily, we affirm the cases brought here on appeal and this case will recieve ordinary treatment." We submit that a sound statement of law can rarely be prefaced by the term "ordinarily" and that an analytical statement can never be so prefaced. If the term "ordinarily" had been deleted, the statement would have been harsh, but it would have had the redeeming grace of being intelligible.

Although petitioners were not able to meet the matter in advance, they did argue the matter in a motion for rehearing and in an application for writ of error to the Texas Supreme Court. In support of their position that a record on appeal is sufficient if it reflects material error and harm to the complaining party, petitioners cited Torrey v. Cameron, 74 Tex.187,11 S.W.1088 (1889); Avocato v. Dell'ara, 57 S.W.296(Tex. Civ.App.1900,no writ); State v. Whorton, 63 S.W.914(Tex.Civ.App.1901,no writ); Castellano v.Marks, 83 S.W.729(Tex.Civ.App.1904, no writ); Garrison v. Richards, 107 S.W.861 (Tex.Civ.App.1908,dism.); Ivy v. Ivy, 112 S.W.110(Tex.Civ.App.1908,no writ); Southern Pac. Co. v. Cox, 136 S.W.102(Tex.Civ.App., 1911,no writ); Magee v. Magee, 272 S.W.252 (Tex.Civ.App.1925,dism.); Harvey v. Hill, 7 Tex.591(1852); McAdams v. Brown, 422 S.W.2d 749(Tex.Civ.App.1967,no writ); Rules 370 and 419, Tex.R.Civ.Proc. and Commentary, 4 Vernon's Ann.Tex.Rules 171.

Again, we shall not further dwell on our arguments because the question here is not whether the Texas Court of Civil

Appeals correctly decided the issues before it but whether the correct procedures were followed. Petitioners submit from the foregoing that the issues were genuine, that they were not frivolous or superficial, and that they were properly preserved, briefed and argued. Petitioners further urge that the Court of Civil Appeals denied the Fourteenth Amendment guaranties by failing and refusing to directly answer the questions raised.

REASONS FOR ALLOWING THE WRIT

We concede at the outset that the Fourteenth Amendment does not require a State to provide for the right of appeal at all. However, the people of Texas by and through their chosen representatives in the Legislature have ordained the right of appeal and the proposition is immaterial. The right to appeal having been ordained, it must be made available to all in an equal, orderly and non-discriminatory manner.

Likewise, we submit that the Fourteenth Amendment requires that the established procedures be followed. While we do not know of any decision under the Fourteenth Amendment requiring that a state appellate court deliver an opinion at all, the practice is too well established, at least in Texas, for anyone to deny that the failure to deliver an opinion constitutes a gross departure from the usual and accepted course of procedure in such instances.

Nevertheless, petitioners submit that they have been denied of due process and equal protection of the law as guaranteed by the Fourteenth Amendment. The constitutional deprival lies not in the law as declared but in the law as applied to the petitioners' case.

> "We must not forget that the role of the courts is not merely to define the right; it is also to administer the remedy. Unless the remedy is actually applied to persons and things, the right is merely a pious idea." Foreward by the Hon. Earl Warren, Civil Justice and the Jury, Prentice-Hall, 1962.

It is well established that there is no constitutional right to an appeal and that the right of appeal may be subjected to reasonable restrictions or may be denied altogether. District of Columbia v. Clawans, 300 U.S.617. Nevertheless, where the law provides the right of appeal, it must be made equally available to all. State ex rel. J. Hahn Bakery Co. v. Anderson, 269 Mo.381,190 S.W.857(1916).

> "This Court has never held that the states are required to establish avenues of appellate revue, but it is now fundamental that, once established, those avenues must be free of unreasoned distinctions that can only impede open and equal access to the Courts." Rinaldi v. Yeager, 384 U.S.305.

The Trial Court denied to petitioners the right to present evidence. The right

to present evidence is as fundamental as the right to be heard. District of Columbia v. Clawans, supra; Georgia Railway & Elec. Co. v. Decatur, 259 U.S.165. The error of the Court of Civil Appeals was equally fundamental. In that court, appellants were entitled not only to the right of appeal, but to the right to be answered. They were entitled to a decision which fairly and squarely meets the points raised. The decision rendered in this case is a study in avoidance and not a learned dissertation based on a study of the record and the briefs and given in answer to the points of law seriously presented, seriously argued and upon which the case turns. Such practice is the firmly established course of appellate procedure in the State of Texas. Petitioners have the constitutional right to have the same avenue of recourse opened to them.

This case raises the Fourteenth Amendment in a context completely removed from the volatile area of race relations; yet it presents squarely the question of whether the Amendment places a practical and effective curb upon official lawlessness; a question of great significance in race relations problems as well as uncounted others. If there is no practical and effective means for distinguishing between arbitrary and capricious action on the one hand and "mere error" on the other, then there is no real hope of confining official action (either judicial or executive) to the Rule of Law. It is the thesis of this petition that there is a practical and effective distinction between arbitrary and capricious action and "mere error"; and that this case provides a clear and readily articulated illustration of

that distinction. A Writ of Certiorari should issue in this cause in order that the court may examine and expound the distinction urged. The exposition and enforcement of the distinction by this Court will bring the Rule of Law a long step closer to reality.

Petitioners submit that the decision of the Texas Court of Civil Appeals was purely ad hoc, that no valid attempt was made to decide the questions fairly and squarely presented, that the opinion constituted an attempt at avoiding the issues rather than answering them and that it was, in final analysis, merely a subterfuge. Petitioners submit that the proceedings departed any reasonable concept of a legal proceedings "according to those rules and principles which have been previously established." They ground this petition on the principles stated in Pennoyer v. Neff, 95 U.S.714:-

> "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They

> then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

In Pennoyer v. Neff, the procedure under consideration was one for providing notice to non-resident parties. In this case different procedures are under consideration. Nonetheless, the basic question is the same. As pointed out in the above quotation the question of what constitutes due process of law embraces every permissible exertion of power affecting private rights. The question here, therefore, is whether the powers exerted by the court in this case fall within or without the concept of due process.

The identity of purpose which inheres in all procedural rules regardless of whether same relate to the subjects of notice and hearing or to other subjects has been most ably stated in Bennett v. Jackson, 172 S.W.2d 395, 397 (Tex.Civ.App.1943, ref.w.m.):

> "The ultimate purpose of all rules of procedure is to secure to every litigant a fair and impartial adjudication of his rights under established principles of substantive law to the end that justice may be done. * * * In order to accomplish this objective, certain qualifications, perogatives and responsibilities are definitely required of, vested in and placed upon the trial judge, jury, witnesses, and each participant in all the courts. Reasonable adherence to the established

> rules by each and all, consistent with a proper exercise of sound judicial discretion, is indispensable to the administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration." (Emphasis supplied).

Petitioners recognize that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law; and that in order to constitute a denial of due process it must be shown that the judgment amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental "principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." American Ry. Express Co. v. Commonwealth of Ky, 273 U.S.269.

We ask the Court to stop a moment and consider: What is the function of an appellate opinion? We say that the function of the opinion is two-fold:

(1) To serve as precedent; This is the well recognized function.

(2) To demonstrate that the Court has correctly applied the applicable principles of law. While this function is not as well recognized, we submit that it is even more universal. On the basis of wide experience we submit that whenever a significant question is involved, it is the well established practice of all Courts, even trial courts, to explain their decisions either orally or in writing. It is fundamental to our system

of jurisprudence that everyone's case shall be decided according to uniform principles of law universally applied to the rich and the poor, the meek and the mighty. The personal and subjective opinion of the judge as to what is right or wrong and what is proper or improper is immaterial. Good judges everywhere feel impelled to demonstrate that they have followed the law; that the judgment rendered is not a mere subjective decision.

We would further urge most strenuously that this Court should presume, almost relentlessly presume, that the judges of the courts below are learned in the law. This presumption should be indulged because it comports with human experience; it is almost always true that our judges are capable and learned men. The presumption should further be indulged because it can rarely be determined whether unfair judicial conduct is attributable to bias, ignorance or other reasons. Finally, the presumption of the learned nature of the courts below should be indulged in every case to avoid a vain and empty pursuit. Judicial misconduct is judicial misconduct regardless of the whys and wherefores that caused it to occur. The result to the injured party is the same in every instance. We submit again that it must be presumed, relentlessly so, that the Texas Court of Civil Appeals is learned in the law and particularly presumed that the Court is learned in the Texas law.

We return the Court's attention to the opinion in hand. Is this a learned dissertation on the law, rendered in good faith by learned men on the basis of a careful

study of the briefs and the record? Or, is it a thin excuse employed to disguise the fact that the case has been disposed of on the basis of unspoken and unknown subjective considerations? We seriously and urgently submit that we will not rise above the rule of men to the Rule of Law until appellate courts are required to meet and deal with serious questions of law in a straightforward and learned manner.

If the action of the Texas Court of Civil Appeals in the case under consideration, when observed, considered and judged from an objective standpoint had some probability of answering the contentions raised by your appellants in a learned manner, there would be no deprival of constitutional guaranties because the Constitution only guarantees a fair hearing, not an error free hearing. If, on the other hand, when objectively observed, considered and judged, it be found that the decision in hand had no reasonable probability of serving as a deliberate and learned answer to the contentions raised by petitioners, then petitioners have not had a fair hearing and a deprival of their constitutional guaranties has occurred.

Putting the proposition in slightly different language, we are asking this honorable Court to determine whether or not there has been a substantial deviation from the normal standard of appellate judicial decision. Does the opinion under consideration meet minimum standards for a learned dissertation upon the law on the basis of a careful study of the briefs and the record? If the minimum standard has not been met, then it is not a "permissible exertion of

power'; but an "arbitrary and capricious exertion of power" in conflict with "established rules and principles."

The procedure adopted by the Texas Court is not the"administration of justice according to law as distinguished from justice according to the personal opinion of the individual attempting to assist in its administration." Instead, it is precisely the latter--justice according to the personal opinion of those occupying judicial position. It is not an administration of justice according to law but an exertion of power according to the personal inclination of the judge; a purely arbitrary and capricious exercise of power.

It is true, of course, that in order that decisions may be made at all, a judge must be allowed both an area for the exercise of sound discretion and a margin for error. But would a learned judge feel that he was answering or avoiding the issues presented if he rendered the instant opinion? It is only when the action taken departs the bounds of reasonable judicial error that the Fourteenth Amendment is invaded.

At first blush it may be thought that the necessary distinction is too subtle to be practical; but this is not so. As Justice Holmes has pointed out: "even a dog distinguishes between being stumbled over and being kicked." Holmes, The Common Law, Little, Brown and Company,1938,p.3. This is quite a subtle though entirely practical distinction.

Moreover, the distinction has long been applied to legislative bodies and administrative officials and agencies. It

has demonstrated itself to be thoroughly practical. Not only has it been applied to test the validity of acts purporting to have been done in the implementation of an established method of law; but it has also been applied to test the validity of legislative enactments purporting to establish a method of law.

In McFarland v. American Sugar Refining Co., 241 U.S. 79,(Holmes, J.)the Court held a presumption created by the Louisiana Legislature to be a violation of the equal protection clause of the 14th Amendment because there was no reasonably probable connection between facts raising the presumption and the fact to be presumed:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'Mobile,J.& K.C.R.Co.v.Turnipseed, 219 U.S.35,43 * * * The presumption created here has no relation in experience to the general facts."

In Tot v. United States, 319 U.S.463, the Court had under consideration:

> "* * * the question of the power of Congress to create the presumption which §2(f) declares, namely, that, from the prisoner's prior conviction

of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute.

"The Government argues that the presumption created by the statute meets the tests of due process heretofore laid down by this court. The defendants assert that it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant. [loc.cit. 466]

* * * * *

"[4.5] The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits. [loc. cit.467]

Thus, we find that even legislative bodies, in the exercise of the broad discretion necessarily vested in them as a part of their power to legislate, are nonetheless confined to the bounds of reasonable relationships.

Similarly, legislative bodies after having adopted a set of rules are not free to ignore them but are bound to observe their own rules and have no power to act except in accordance with their rules. Petitioners submit that the established procedure in the appellate court requires more than a piece of paper with a few pleasantries written on it. Procedure requires a learned dissertation based upon a careful consideration of the record and the briefs. The Court below is not free to disregard its own procedures.

In United States v. Smith, 286 U.S.6, the United States Senate had voted to confirm the appointment of George Otis Smith to the Federal Power Commission and after appropriate notification, commissioning and swearing-in, Smith took office. Upon the very next session day following his assumption of office the Senate voted to reconsider and withdraw its consent. When the controversy reached this Court, it held that under those circumstances and the Senate's then existing rules, the Senate's "power to reconsider was gone." The Court pointed out that the question was not the constitutionality of the rules but the proper construction to be given them. The rules themselves withheld from the Senate the "power to reconsider."

In the United States v. Ballin, 144 U.S.1, the rules of the House of Representatives were under consideration and the Court commented thusly with regard thereto:

> "The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

At a subsequent point in the opinion the Court focuses attention upon the very heart of the reason why the power of the houses of Congress to act is dependent upon their rules:

> "The two houses of congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the

> body, and its action is not the action of any separate member or number of members, but the action of the body as a whole; and the question which has, over and over again, been raised is, what is necessary to constitute the official action of this legislative and representative body?"

In short, the action taken must bear a reasonable relationship to the end sought to be accomplished. The end sought to be accomplished by the Court below in delivering the opinion at hand was to implement the Rule of Law, to establish legal precedent, and to assure the parties that the case was being decided on the basis of sound legal principles and not some subjective consideration of the judges whether or not arising from good intentions or even from plain ignorance, and, to act as a learned dissertation on the questions of law at hand.

We submit from the foregoing citations and others, that a similar test has long been applied to legislative conduct. We further submit that it has been numerously applied to administrative persons and bodies. In Vitarelli v. Seaton, 359 U.S.535, Vitarelli had been dismissed from his post in the Department of Interior. The Court held:

> "Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect." [loc.cit. 544]

Even the minority of the court which dissented as to another aspect of the case agreed with the above holding and said:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. See Securities & Exchange Commission v. Chenery Corp., 318 U.S.80, 87-88,* * *. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See Service v. Dulles, 354 U.S.363, * * *. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword. Therefore, I unreservedly join in the Court's main conclusion that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of the Interior Order No. 2738 was invoked but not observed." [loc.cit. 546]

Prior to the Vitarelli decision, a similar holding with respect to the Department of Justice had been made in United States ex rel Accardi v. Shaughnessy, 347 U.S.260; and another had been made with respect to the Secretary of State in Service v. Dulles, 354 U.S.363.

In Tellin v. United States, 374 U.S.109, the Court held that the House Committee on Unamerican Activities was likewise bound to the observance of its rules.

SUMMARY

Judging the relationships between particular acts on the one hand and particular objectives on the other does not involve a process that is arcane, abstruse or inscrutable. It is eminently practical and practicable and, in fact, necessary to every system of law known to man. It provides a reliable means by which to judge which judicial acts are merely erroneous and which constitute denials of due course of law and due process of law.

Petitioner says that the judicial acts here under consideration clearly departed the realm of reasonable relationship to the objectives of the methods of law ostensibly employed and therefore constitute denials of due process of law.

Again, it is elementary that every error of law does not raise a constitutional question. The question is whether petitioners have been subjected to discriminatory treatment. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.673. When the action taken departs the bounds of reasonable probability of mistake and reflects a conscious indifference to established rules of law, then a violation of due process has occurred. With all due respect, the decision below represents a study in avoidance of petitioners' points of error.

It must be presumed that the Court of Civil Appeals is learned in the law. It

must be presumed that the Texas Court has studied the briefs and arguments there presented by these petitioners. It must be presumed that the Court is skilled in meeting and answering (as opposed to avoiding) the points of law necessary to the case. The honorable Court below has wholly failed to do so. When the record reflects that the Court, being familiar with the law and the facts, is proceeding in opposition thereto either by choice or through conscious indifference, a violation of the constitutional guarantee of an orderly trial in accordance with established procedure in a competent tribunal is violated. Kilbourn v. Thompson, 103 U.S.168,182; McCullough v. Virginia, 172 U.S.102.

PRAYER

For the reasons given, your petitioners ask that this petition for a writ of certiorari be granted.

Respectfully submitted,

June 16, 1969

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APPENDIX

PROCEEDINGS IN THE COURT OF CIVIL APPEALS

APPELLANTS' POINTS OF ERROR
(filed July 24, 1968)

Point One: The Trial Court erred in excluding from evidence the answers which appellee gave to certain requests for admission in Cause No. 80,457-F/A which answers established that the Wisteria property was not a trade-in upon the Sims Avenue property and that appellants received no consideration for their conveyance to appellee of the Wisteria property.

Point Two: The Trial Court erred in overruling appellants' motion for judgment N.O.V. asserting that appellee's answers to the requests for admissions in Cause No. 80,457 F/A are solemn judicial declarations which he cannot be heard to deny and that such answers establish that appellee gave no consideration for the Wisteria Street premises and is a constructive trustee thereof.

OPINION OF THE COURT
(October 25, 1968)

Durwood C. Phillips and wife, Mary Sue Phillips brought suit against Bill C. Latham in trespass to try title to recover title and possession of certain described real estate situated on Wisteria Street in Dallas which had previously been the home of the plaintiffs. Plaintiffs alleged that the defendant fraudulently induced them to convey their home to defendant; that defendant approached plaintiffs urging them to buy a house which he would build for them in Duncanville, and represented that he would secure 100% financing on the proposed new

house; that defendant represented that he would find a buyer for plaintiff's home to yield not less than $4,000.00 net after expenses for plaintiff's equity or would personally pay plaintiffs such amount if they would convey their Dallas property; that relying upon defendant's representations plaintiffs executed a deed conveying their home in escrow to a title company, and that the defendant in violation of his representations thereafter fraudulently obtained title to plaintiff's property but has failed to pay plaintiffs the $4,000.00 as he falsely represented. The case was tried before a jury and based upon the verdict judgment was rendered in favor of the defendant. Durwood O. Phillips and wife have appealed.

The pleadings and testimony of appellee Latham was to the effect that Mr. and Mrs. Phillips' conveyance of their Dallas property was by the agreement of the parties a down payment on a new house in Duncanville which he had contracted to build for them. The jury found in answer to special issue number 14 that appellants agreed to transfer said property to Latham as a down payment on the Duncanville property. In appellants' pleadings and testimony it was contended that Latham, when he was unable to find a buyer of their Dallas property prior to the closing of the loan on the new Duncanville house falsely represented to appellants that the savings and loan association would not allow them to hold two loans at the same time; that such representation was a material one, and made by Latham for the purpose of inducing, and did induce appellants to make a conveyance of their property, but that such conveyance was made with the understanding that the deed would be deposited and held in escrow until Latham paid $4,000.00 to appellants. In answer to issues Numbers 1 and 7 it was found in effect that Latham did not represent to appellants

as they contend, that the Duncanville Savings Association would not allow appellants to hold two loans at the same time, and that Latham did not prior to the execution by appellants of the deed to their Dallas property represent that such deed would be deposited and held in escrow until $4,000.00 had been paid to appellants by Latham.

Appellants urge two points in which it is contended (1) that the court erred in excluding from the evidence answers which appellee gave to certain requests for admission in another suit between the parties which answers, appellants contend, established that the conveyance of their Dallas property was not a trade-in upon the Duncanville property, and that appellants received no consideration for their conveyance to appellee of the Dallas property, and (2) erred in overruling appellants' motion for judgment non obstante veredicto, asserting that appellee's answers to the requests for admissions in such other suit are judicial declarations which appellee cannot now deny, and that such answers establish that appellee gave no consideration for the Dallas property, and that appellee is therefore holding such property for appellants as a constructive trustee. By appellants' Bill of Exceptions as set out in the transcript it is shown that there was a prior litigation between the parties in the 116th District Court of Dallas County, the docket sheet of which shows that such action was a suit by appellant Phillips against Latham on a sworn account for concrete work which he, Phillips, did on the construction of the Duncanville property. The answers of Latham to the requests for admission which appellants sought to place in evidence in this case were given in and are a part of the record in that case.

Appellants' points are overruled. Rule 169, Texas Rules of Civil Procedure provides that:

"Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."

By the very terms of the rule the request for admissions and answers in a different law suit were inadmissible and the court properly refused to admit them in evidence.

The findings of the jury support and require the judgment rendered. No statement of facts had been filed in this court. Ordinarily a judgment should not be reversed for alleged erroneous exclusion of evidence in the absence of a statement of facts. Torrey v. Cameron, 74 Tex.187, 11 S.W. 1088 (Sup.Ct.,1889); Daniel v. Daniel, Tex.Civ.App.,128 S.W.469 (CCA,1910;WritRef.); Robinson v. Howard County, Tex.Civ.App.,287 S.W.2d 234(CCA,1956,N.R.E.); Klimist Store Fixture Mfg.Co.v.Bearden,Tex.Civ.App., 374 S.W.2d 783(CCA,1964,N.W.H.). There was no clear showing of an exclusion of evidence which was reasonably calculated to cause and probably did cause rendition of an improper judgment.

The judgment is affirmed.

CECIL C. COLLINGS
ASSOCIATE JUSTICE

JUDGMENT
(October 25, 1968)

This cause came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed.

It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Appellants, Durwood O. Phillips and wife Mary Sue Phillips and the sureties on their appeal bond, F.L.Howell and C.R.Smith, for which let execution issue, and that this decision be certified below for observance.

APPELLANTS' MOTION FOR REHEARING
(Filed November 9, 1968)

One: This Honorable Court erred in overruling Appellants' Point One which reads as follows: [Omitted, see above]

Fifteen: This Honorable Court failed to accord appellants due process of law and equal protection of the law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by denying to appellants the right to place the full facts of their case before a jury.

Sixteen: This Honorable Court failed to accord appellants due process of law and equal protection of the law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by failing to discuss the true and complete facts concerning appellants' points of error one and two.

Seventeen: This Honorable Court failed to accord appellants due process of law and equal protection of law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by holding that appellants should have bought and paid for a statement of facts without pointing out in what respect the record presented is insufficient.

ORDER
(November 15, 1968)

This day came on to be heard Appellant's motion for rehearing and the same, having been duly considered, is hereby overruled.

PROCEEDINGS IN THE SUPREME COURT OF TEXAS

APPLICATION FOR WRIT OF ERROR
(Filed Ct. Civ. App., December 16,1968,
Supreme Ct. Tex., December 18, 1968)

Point One: The error of the Court of Civil Appeals in overruling petitioners' Point One as follows: [Omitted, see above]

Point Three: The Court of Civil Appeals failed to accord petitioners due process of law and equal protection of the law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by denying to petitioners the right to place the full facts of their case before a jury.

Point Four: The Court of Civil Appeals failed to accord petitioners due process of law and equal protection of the law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by failing to discuss the true and complete facts concerning petitioners' points of error one and two.

Point Six: The Court of Civil Appeals failed to accord petitioners due process of law and equal

protection of the law under Article I, Sections 15 and 19 of the Texas Constitution and Amendments VII and XIV of the United States Constitution by holding that petitioners should have bought and paid for a statement of facts without pointing out in what respect the record presented is insufficient.

ORDER
(January 22, 1969)

Application of petitioners for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and the same is, refused.

It is further ordered that applicants, Durwood O. Phillips et ux, and their sureties, F.L. Howell and C.R. Smith, pay all costs incurred on this application.

MOTION FOR REHEARING
(filed February 6,1969)

Point One: This Honorable Court erred in not granting point 1 of the writ application, to-wit: [Omitted, see above]

Point Three: This Honorable Court erred in not granting point 3 of the writ application, to-wit: [Omitted, see above]

Point Four: This Honorable Court erred in not granting point 4 of the writ application, to-wit: [Omitted, see above]

Point Six: This Honorable Court erred in not granting point 6 of the writ application, to-wit: [Omitted, see above]

ORDER
(February 19, 1969)

Petitioners motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled..

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C., § 1257(3). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rule 169, Tex.Rules Civ.Proc. * * * Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither

constitutes an admission by him for any other purpose nor may be used against him in any other proceeding. * * *.

Rule 370, Tex.Rules Civ.Proc. In view of the crowded condition of the dockets of the appellate courts, the record and briefs on appeal should be limited as far as possible to the questions relied on for reversal. The primary purpose of the courts is to administer justice between the parties with as little expense and delay as possible. Liberal provisions are therefore made in these rules for amendments on appeal to bring forward any material matter which may have been omitted. With this protection, the bar is expected to cooperate in shortening the records in furtherance of the provisions of these rules.

Rule 419, Tex.Rules Civ.Proc. Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by opposing party.